

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEO MARTINEZ ABBY,

Defendant-Appellant.

UNPUBLISHED
February 27, 2007

No. 262365
Saginaw Circuit Court
LC No. 04-024065-FC

Before: Hoekstra, P.J. and Markey and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and sentenced to a term of 40 to 60 years' imprisonment. Defendant appeals as of right. We affirm defendant's conviction, but remand for resentencing.

I. Sufficiency of the Evidence

This case arises from the killing and dismemberment of Calvin Tubbs. On appeal, defendant argues that the evidence at trial showed, at best, only that he participated in the dismemberment of Tubbs following his death and was thus insufficient to support his conviction of second-degree murder. We disagree.

In reviewing a claim that insufficient evidence was presented to support a conviction, this Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence and any reasonable inferences arising from that evidence may constitute satisfactory proof of the elements of a crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

Generally, to convict a defendant of second-degree murder the prosecution must prove that the defendant, acting with malice, caused the death of the victim without justification or excuse. See *People v Fletcher*, 260 Mich App 531, 559; 679 NW2d 127 (2004). However, because the prosecution alternatively argued that defendant aided and abetted an unidentified individual in the killing of Calvin Tubbs, defendant's conviction could also be supported by evidence that "the crime was committed by the defendant or another, that the defendant performed acts or gave encouragement that aided or assisted the commission of the crime, and

that the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time the defendant gave the aid or assistance.” *People v Jones*, 201 Mich App 449, 451; 506 NW2d 542 (1993); see also *People v Coomer*, 245 Mich App 206, 223; 627 NW2d 612 (2001) (“[a]nyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted as an aider and abettor”).

Here, when viewed in a light most favorable to the prosecution, the evidence shows that Tubbs left his apartment with defendant on October 27, 2003, and was not seen again until portions of his dismembered body were discovered hidden inside black garbage bags strewn across an isolated, trash-laden field approximately one week later. The evidence further shows that within hours of leaving with Tubbs, defendant and a second unidentified individual sought to borrow a saw from various members of defendant’s family, and that defendant was ultimately able to secure a battery-powered reciprocating saw from his cousin, Victor Hunter, which was returned to Hunter the following day in a black garbage bag. Tissue containing Tubbs’ DNA was subsequently discovered in the blade housing of the reciprocating saw borrowed by defendant, which both the pathologist and tool mark identification expert testified was of the type used to dismember Tubbs. Defendant’s finger and palm prints were also discovered on several of the black garbage bags in which Tubbs’ limbs were found, as were the prints of another, unidentified individual.

The evidence further shows, when viewed in a light most favorable to the prosecution, that Tubbs was to be involved with defendant in a large drug transaction near the time of his disappearance, and that Tubbs had angered defendant with statements made to others concerning drugs in defendant’s possession only a few weeks before he disappeared. Testimony presented at trial also showed that during a conversation about this event in which he was told by a mutual friend that he should be more careful about what Tubbs knows of his affairs, defendant indicated that he wished to “cut [Tubbs] loose” but could not do so because he knew too much.

The evidence also shows that after Tubbs’ limbs were found and defendant’s prints identified, defendant failed to make his presence known on two separate occasions when the police were at the home of girlfriend, Larissa White. On one such occasion defendant hid in a bedroom of the home while detectives, within earshot of the bedroom, questioned White regarding defendant’s whereabouts. Later, during execution of a search warrant at White’s home, defendant barricaded the front door of the home and failed to respond to police demands to make his presence known. Defendant was subsequently discovered leaving a child’s bedroom, where a revolver was found hidden on the floor beneath a bed. Subsequently, forensic testing revealed DNA from both defendant and a second, unidentified individual on the gun. Two bullets matching the revolver’s caliber were also found under the mattress of the bed.

Contrary to defendant’s assertion, the foregoing evidence was sufficient to support a reasonable trier of fact in concluding that defendant was involved in the murder of Calvin Tubbs. *Johnson, supra*. Indeed, when viewed in a light most favorable to the prosecution, the evidence showed that defendant was the last person to have seen Tubbs, whose severed limbs were subsequently discovered in garbage bags on which defendant’s palm and fingerprints were found. These facts, in conjunction with evidence that defendant was involved with Tubbs in the drug trade, had borrowed a saw later found to contain a portion of Tubbs’ tissue on the day Tubbs disappeared, and attempted to hide his possession of a revolver from the police, were

sufficient to permit the jury to infer that defendant was involved in Tubbs' killing. Although no one is able to say with any certainty exactly how Tubbs' death occurred, as the concealment of Tubbs' head and torso prevented the pathologist from making that determination, an inference of criminality in Tubbs' death and defendant's complicity in that crime may be drawn from the evidence that Tubbs' body was dismembered with a saw borrowed by defendant on the day Tubbs disappeared. See, e.g., *People v Usher*, 121 Mich App 345, 351; 328 NW2d 628 (1982) (decapitation of victim can be viewed as an attempt to destroy evidence of the crime of murder, thereby evincing consciousness of guilt); see also *People v Wise*, 134 Mich App 82, 88; 351 NW2d 255 (1984) (to establish the corpus delicti of a crime, "the evidence adduced need only tend to show consistency with unlawfulness in causing the injury in question"), quoting 1 Wharton, Criminal Evidence (13th ed), § 17, p 28. Thus, we conclude that the evidence was sufficient to support defendant's conviction of the second-degree murder of Calvin Tubbs either as a principal, or under an aiding and abetting theory.

II. Corpus Delicti

Citing the corpus delicti rule, defendant next argues that statements attributed to him were improperly admitted at trial because there was no independent proof that he was involved in Tubbs' killing and dismemberment. Because the corpus delicti rule does not apply to any of the statements attributed to defendant at trial, we disagree.

To preserve a corpus delicti challenge for review, the issue must be raised before the trial court. See *People v Ish*, 252 Mich App 115, 116; 652 NW2d 257 (2002). Defendant failed to challenge the admission of his statements based upon the corpus delicti rule. Accordingly, this Court's review is for plain error. *Id.*

The corpus delicti rule requires that a preponderance of direct or circumstantial evidence must prove the occurrence of the crime before a defendant's confession may be admitted. *People v Konrad*, 449 Mich 263, 269-270; 536 NW2d 517 (1995); see also *People v Neal*, 83 Mich App 102, 105; 268 NW2d 303 (1978) ("the corpus delicti of a felonious homicide . . . consists of evidence of a death and of a criminal agency as its cause"). The purpose of the corpus delicti rule is to prevent a defendant from being convicted of a crime that did not occur and to minimize the weight of a confession by requiring collateral evidence to support a conviction. *People v McMahan*, 451 Mich 543, 548-549, 548 NW2d 199 (1996); *Konrad*, *supra* at 269. But, where the defendant makes admissions of fact that do not amount to confessions of guilt, those admissions may be admitted to prove the corpus delicti of the crime. *People v Rockwell*, 188 Mich App 405, 407; 470 NW2d 673 (1991), citing *People v Porter*, 269 Mich 284, 289-291; 257 NW 705 (1934). With respect to the distinction between such statements for purposes of the corpus delicti rule, our Supreme Court has explained:

If the fact admitted necessarily amounts to a confession of guilt, it is a confession. If, however, the fact admitted does not of itself show guilt, but needs proof of other facts, which are not admitted by the accused, in order to show guilt, it is not a confession, but an admission, [*Porter*, *supra* at 290.]

Here, although several of the statements attributed to defendant at trial admitted subordinate facts and guilty conduct, they did not by themselves constitute an admission of guilt.

Id. Consequently, their admission was not dependent on the requirements of the corpus delicti rule.

In any event, as previously explained, an inference of criminality in Tubbs' death may be drawn from the evidence that Tubbs' body was dismembered with a saw borrowed by defendant on the day Tubbs disappeared. *Usher, supra*; *Neal, supra*. The evidence was thus sufficient to support that Tubbs' death was the result of criminal agency independent of defendant's statements. We therefore find no plain error requiring relief. *Ish, supra*.

III. Jury Instructions

A. Intervening Cause of Death

Defendant next argues that the trial court erred in refusing to instruct the jury on cause of death in accordance with CJI2d 16.15. We disagree.

Jury instructions must include all elements of the crime charged and any material issues, defenses, and theories for which there is evidence in support. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). Issues of law arising from jury instructions are reviewed de novo on appeal, but a trial court's determination whether an instruction was applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Here, the trial court denied defendant's request to instruct the jury with CJI2d 16.15 on the ground that the instruction was "inappropriate . . . under the facts of this case." We find no error in the trial court's conclusion in this regard.

The use note to CJI2d 16.15, which instructs that an act of the defendant must be the cause of death,¹ states that the instruction "is designed for use where there is an issue as to whether the act of the defendant caused death, or whether death was caused by some intervening cause." In arguing that the instruction was improperly denied, defendant effectively concedes that the evidence at trial supported that he was involved in the dismemberment of Tubbs' body. He argues, however, that the jury should have been permitted to decide whether Tubbs' dismemberment, or something else, caused Tubbs' death. The evidence adduced at trial does not support this claim. Indeed, the forensic pathologist who examined Tubbs' remains definitively testified that dismemberment occurred after death, and no evidence to the contrary was presented at trial. Thus, under the facts of this case, dismemberment could not have been an intervening cause of death to support the instruction.

¹ Specifically, CJI2d 16.15 instructs:

[There may be more than one cause of death.] It is not enough that the defendant's act made it possible for the death to occur. In order to find that the death of [name deceased] was caused by the defendant, you must find beyond a reasonable doubt that the death was the natural or necessary result of the defendant's act.

In any event, the instruction's use note expressly states that it is not to be used "for cases involving aiding and abetting, concert of action, or conspiracy." Although the purpose for this prohibition is not similarly stated by the notes, it is clear that the exclusion stems from that fact that to instruct a jury that the death at issue must have been "the natural or necessary result of the defendant's act" contradicts the liability imposed by the theory of aiding and abetting in a case involving homicide, i.e., that one who participates in the crime by providing aid or encouragement may be held liable for the killing as a principal regardless whether his acts were the definitive cause of death. Thus, the trial court did not err in finding CJI2d 16.15 inapplicable to the facts of this case and denying defendant's request to so instruct the jury.

B. Instruction on Aiding and Abetting

Defendant also argues that the evidence presented at trial was insufficient to support instructing the jury on aiding and abetting. Again, we disagree. Because there was no objection to the aiding and abetting instruction, this Court's review is for plain error that affected defendant's substantial rights.² *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

This Court has held that "[a]n aiding and abetting instruction is proper where there is evidence that (1) more than one person was involved in the commission of a crime, and (2) the defendant's role in the crime may have been less than direct participation in the wrongdoing." *People v Head*, 211 Mich App 205, 211; 535 NW2d 563 (1995). Here, the prosecution presented evidence that defendant was not alone when on the day of Tubbs' disappearance, he telephoned his brother to ask that he purchase and then bring defendant a new saw. Defendant's brother testified that during this conversation he overheard a man who demonstrated an awareness of the circumstances by describing the type of saw needed for the work to be done speaking in the background. Defendant failed to identify this person despite having twice been asked to do so by his brother. This evidence, when viewed in conjunction with that indicating that the fingerprints and DNA of an unidentified individual were found on the garbage bags containing Tubbs' limbs and the .38 caliber revolver recovered at the time of defendant's arrest, supported the trial court's instruction on aiding and abetting. *Id.*

IV. Evidentiary Issues

A. Drug Activity

Defendant next argues that he was denied his right to a fair trial and to confront the witnesses against him by the erroneous admission of testimony that he was interested or otherwise involved with the victim in the trafficking of illegal drugs. We disagree.

² Defendant asserts in his brief on appeal that an objection to such instruction was raised below. However, he has failed, as required by MCR 7.212(C)(7), to provide any citation to the record in support of this assertion and our review of the record reveals no such objection. We further note that defendant's assertion of an objection to instruction of the jury on the theory of aiding and abetting contradicts his argument, discussed *infra*, that his counsel was ineffective for having failed to raise such an objection at trial.

1. Testimony of Derrick Taylor

Derrick Taylor testified that shortly before Tubbs' disappearance defendant indicated an interest in selling cocaine, and that he was upset over Tubbs' statements to others regarding illegal drugs but could not "cut him loose" because he knew too much. On appeal, defendant argues that this testimony is inadmissible hearsay. Defendant further argues that even if admissible, Taylor's testimony about defendant's drug activities and concern over Tubbs' knowledge thereof should have been excluded under MRE 403 as substantially more prejudicial than probative.

Although at trial defendant objected to Taylor's testimony as "highly more prejudicial than probative," he failed to object on the ground that the testimony constituted inadmissible hearsay.³ This Court reviews a preserved claim of error regarding the admission of evidence for an abuse of the trial court's discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). But, an unpreserved claim of error will only be considered to the extent that a defendant has shown plain error affecting his substantial rights. *Carines, supra* at 764. The abuse of discretion standard acknowledges that there will be circumstances in which there will be more than one reasonable and principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). When the trial court selects one of the principled outcomes, there is no abuse of discretion and it is proper for the reviewing court to defer to the trial court's judgment. *Id.*; see also *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," MRE 801(c), and is generally inadmissible unless it falls within an exception, MRE 802. Certain statements, however, including statements made by a party when offered against that party by a party opponent, are excluded by MRE 801(d) from the definition of hearsay. See MRE 801(d)(2)(A). Defendant's statements to Taylor, offered by the prosecution, fall within the exclusion set forth in MRE 801(d)(2)(A) and thus do not constitute inadmissible hearsay. Consequently, defendant has failed to show plain error in the admission of Taylor's testimony on this ground. *Carines, supra*.

Moreover, the probative value of this testimony was not outweighed by the danger of unfair prejudice under MRE 403. Unfair prejudice occurs "when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence." *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002). In challenging Taylor's testimony concerning defendant's statements as unfairly prejudicial, defendant asserts that his drug activity was too far removed from the charged offense of murder to be relevant and served only to inject issues of illegal conduct for which defendant

³ Contrary to defendant's assertion in his brief on appeal, he did not object to Taylor's testimony regarding defendant's own statements as hearsay. Rather, defendant objected on this ground only to Taylor's testimony concerning statements made to him by Tubbs concerning defendant. Objections to this testimony, which was on three separate occasions unilaterally offered by Taylor despite being warned by the prosecution to "focus . . . on defendant's words," were sustained by the trial court.

was not on trial. Contrary to this assertion, however, Taylor's testimony concerning defendant's drug activity and concern over Tubbs' knowledge thereof established a motive for the killing and was thus highly relevant to the charge at issue. It is well settled that evidence of a defendant's motive is always relevant in a murder case. *People v Herndon*, 246 Mich App 371, 412-413; 633 NW2d 376 (2001). This is especially true where, as here, the proofs surrounding the killing are largely circumstantial. See *People v Shaw*, 9 Mich App 558, 566; 157 NW2d 811 (1968) ("[p]roof of motive is highly relevant in a case . . . where there are no eyewitnesses and the prosecution's case is necessarily a circumstantial one"); see also *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995). Because the challenged evidence supplied a motive for the killing, its probative value to the otherwise circumstantial proofs far exceeded its prejudicial effect. The trial court did not, therefore, abuse its discretion in admitting the evidence over defense objection. *Babcock, supra; Maldonado, supra*.

2. Testimony of Eugenia Hardy

Defendant also argues that Tubbs' statements to his cousin, Eugenia Hardy, concerning his intent to participate with defendant in the purchase of a large quantity of marijuana were improperly admitted by the trial court under MRE 803(3). Specifically, defendant argues that Tubbs' statements to Hardy were not "conceptually tied to the killing" and thus should not have been admitted under MRE 803(3). Again, we disagree.

Because this argument is a challenge to the relevance of Hardy's testimony to the issues to be tried as opposed to its admissibility under MRE 803(3), resolution of this arguably preserved evidentiary issue turns on whether the challenged testimony meets the requirements for relevance set forth in MRE 401. Pursuant to MRE 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Here, the challenged testimony tends to establish that defendant and the victim were involved in a financially substantial drug transaction just weeks before the victim's disappearance and death. We find that the admission of this evidence was within the reasonable and principled range of outcomes because it provided evidence of a possible motive, which, as previously noted, was highly relevant in this case given the largely circumstantial proofs. *Babcock, supra*; see also *Shaw, supra*. Accordingly, we reject defendant's assertion that Hardy's testimony was improperly admitted because it lacked a conceptual tie to Tubbs' killing.

We similarly reject defendant's assertion that Hardy's testimony should have nonetheless been excluded as more prejudicial than probative under MRE 403. By challenging the authorities the trial court relied on in admitting this evidence as distinguishable given the prejudice attendant illicit drug activities, defendant sufficiently preserved this issue for review by this Court. However, as already discussed, given the circumstantial nature of the proofs in this case, the probative value of evidence establishing motive far exceeded the prejudicial effect of evidence regarding defendant's purported drug activities. *Shaw, supra; Fisher, supra*. Thus, we are not persuaded that the prejudicial effect of such evidence served to remove the admission of Hardy's testimony from the range of reasonable and principle outcomes. *Babcock, supra; Maldonado, supra*.

Defendant also argues, however, that the admission of Tubbs' statements through the testimony of Hardy denied him his state and federal constitutional rights to confront the

witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. Although defendant challenged the admissibility of Hardy's testimony as speculative and prejudicial, he failed to object in the trial court on the basis of his rights to confrontation. Accordingly, this issue is unpreserved; consequently defendant must establish plain error affecting his substantial rights. *Carines, supra*. Defendant has, however, failed to meet his burden under the plain error rule.

In arguing a violation of his rights to confront the witnesses against him, defendant asserts merely that "because the deceased was unavailable, [d]efendant's crucial right to confront and cross-examine this witness was gutted." However, our Supreme Court has held that a defendant's constitutional right to confront the witnesses against him is not violated if the statement at issue falls "within a firmly rooted hearsay exception." *People v Washington*, 468 Mich 667, 671-672; 664 NW2d 203 (2003). The rationale for this rule is that the "indicia of reliability" necessary to satisfy the concerns underlying the right to confrontation "can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980); see also *People v Coy*, 258 Mich App 1, 16; 669 NW2d 831 (2003).⁴ As noted, the trial court admitted Hardy's testimony concerning Tubbs' statements under MRE 803(3), the applicability of which defendant does not challenge on appeal. Because MRE 803(3) is a firmly rooted exception to the rule against hearsay, see *Coy, supra*, the application of which defendant does not challenge, he has failed to show plain error on this ground. Consequently, we conclude that defendant was denied neither his right to a fair trial nor to confront the witnesses against him.

B. Gun Evidence

Defendant also argues that he was denied his due process right to a fair trial by the admission of evidence concerning the .38 caliber revolver the police discovered at the home of his girlfriend, Larissa White.⁵ Because defendant failed to object to the admission of this evidence, this Court's review is again limited to determining whether defendant has established plain error affecting his substantial rights. *Carines, supra*.

⁴ We recognize that in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court rejected the reliability test established in *Roberts, supra*, with regard to the admissibility of "testimonial" evidence. Specifically, the Court held that regardless of state evidentiary laws a testimonial statement made by an unavailable witness against a defendant is not admissible if the defendant had no opportunity to cross-examine the witness. The Court further held, however, that where nontestimonial hearsay is at issue, state hearsay law remains applicable. *Crawford, supra* at 68. The statement at issue here was not testimonial in the sense envisioned by the Court in *Crawford*. See *id.* at 51-52. Here, the evidence was derived in an informal setting between family members with no indication that the conversation was intended to further an investigation or prosecution. There was no police or prosecutorial involvement in the discussions. Thus, we find that the evidence did not constitute a "testimonial" statement and was subject to, and admissible under, this state's hearsay rules.

⁵ Defendant's assertion that argument by the prosecutor concerning the gun also denied him a fair trial is addressed *infra*, with the discussion of his claim of prosecutorial misconduct.

In challenging the admission of the gun into evidence at trial, defendant argues that the absence of any evidence connecting the gun to Tubbs' death and the fact that the weapon was found in the bedroom of a child rendered the gun irrelevant to his prosecution for Tubbs' murder. However, as previously noted, evidence is relevant if it holds any tendency to make a fact of consequence at trial more or less probable than without that evidence. MRE 401. Consistent with this rule, it is well accepted in Michigan that evidence showing a defendant's consciousness of guilt, such as evidence of flight to avoid arrest, procuring perjured testimony, and attempts to hide or destroy evidence, is admissible. See *People v Hooper*, 50 Mich App 186, 199; 212 NW2d 786 (1973); see also, e.g., *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995) ("[s]uch evidence is probative because it may indicate consciousness of guilt"). Here, although the exact cause of Tubbs' death could not be determined because his head and torso could not be found and despite there being no direct evidence establishing that the gun at issue was used in Tubbs' murder, the circumstances surrounding the weapon's discovery rendered it both relevant and admissible.

Detective Randy Pfau of the Saginaw County Sheriff's Department testified that on the day the gun was discovered he knocked on the front door of White's home and, while "hollering" as loud as he could, announced that he was a sheriff's deputy there to execute a search warrant. No one, however, answered the door of the home. Another officer, whom Pfau described as a "fairly substantial guy," then used a 75-pound ram to strike the door in an effort to gain entry into the home. When the door "surprisingly" did not open, a second, successful attempt at using the ram was made, with officers still loudly announcing their presence as police executing a warrant.

After the door opened, Pfau saw that a dining room chair had been propped against the door, which had also been "dead bolted." Once inside the home, Pfau continued to loudly identify himself and the other persons present as police officers, while also questioning whether there was anyone in house. After securing the kitchen, Pfau and two other officers moved toward a hallway off of which two bedrooms were located. As they approached, Pfau heard someone leave the bedroom on the left. Pfau testified that the officers ordered this person to stop, lie down on the floor, and identify himself. When the person failed to comply with these directives, Pfau moved from around the corner into the hallway, where he saw defendant standing with his arms to his side. Pfau testified that after seeing defendant he again ordered him to the floor, but that defendant just stood there looking to the floor. Pfau then holstered his weapon and took defendant into custody.

After defendant was taken into custody, the officers searched the home. During this search Pfau discovered an unloaded .38 caliber Smith & Wesson revolver, on the grip of which the DNA of both defendant and a second, unidentified individual was later discovered, lying on the floor of what appeared to be a child's bedroom, just behind the headboard of a bed in that room. Pfau testified that this was also the room from which he heard defendant appear, and that under the mattress of the bed he also found two "live rounds for a .38 caliber gun." During her testimony, Larissa White denied that the revolver was hers and indicated that she did not know that the gun was in her house.

Defendant's conduct during execution of the search warrant evinced a guilty conscience and an attempt to hide evidence and, when considered in connection with evidence that defendant was involved in the dismemberment of Tubbs, rendered the weapon relevant to his

prosecution for Tubbs' murder. *Hooper, supra*; MRE 401. Accordingly, defendant has failed to establish error, plain or otherwise, in the admission of the gun as evidence at his trial.

Moreover, even assuming that evidence of the gun was erroneously admitted, such error was not so prejudicial as to have affected defendant's substantial rights. *Carines, supra*. Indeed, even without such evidence, the evidence at trial was sufficient to establish that Tubbs' death resulted from criminal acts in which defendant participated, either as principal or as an aider and abettor. *Usher, supra*; *Wise, supra*.

V. Prosecutorial Misconduct

Defendant next argues that he was denied a fair trial as a result of numerous instances of misconduct by the prosecutor. We disagree.

Generally, this Court reviews de novo claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). However, because defendant failed to object to any of the prosecutor's alleged misconduct at trial, this Court's review is limited to determining whether defendant has demonstrated plain error affecting his substantial rights. *Id.*; *Carines, supra*.

In challenging the conduct of the prosecutor at trial, defendant first claims that the prosecutor's closing argument concerning his "drug involvement" and the relevance of the .38 caliber revolver exacerbated the erroneous admission of that evidence. Noting that the saw, which contained tissue traced to Tubbs, was not itself "forensically" connected to defendant, defendant also argues that the prosecution's use of this evidence to argue that he lured Tubbs from his apartment then killed and dismembered him was similarly improper. However, as already discussed, evidence concerning the revolver and defendant's involvement with the victim in illegal drug activity was properly admitted at trial. Thus, the prosecutor was free to argue this evidence and any reasonable inference arising from that evidence. *Ackerman, supra* at 450. Moreover, although forensic testing of the saw did not yield evidence connecting the saw to defendant, the circumstances of his having borrowed the saw on the day of Tubbs' disappearance supported the prosecution argument that defendant lured Tubbs from his apartment then killed and dismembered him. *Id.*

For this same reason, the prosecutor's conduct in presenting an aiding and abetting theory and referencing the burn on Tubbs' hand as "torture" was also not improper. As previously discussed, there was sufficient evidence to support that defendant acted in this matter with a second, unidentified individual. Furthermore, the forensic pathologist who examined Tubbs' remains testified that a burn he found on Tubbs' right hand was consistent with that from a cigarette and was suffered within a few hours to a couple of days before his death. The prosecutor was permitted to argue the reasonable inferences arising from this evidence and was not required to do so in the "blandest" of possible terms. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Consequently, defendant has failed to establish plain error on these grounds.

Defendant has similarly failed to establish plain error in the prosecutor's argument concerning the testimony of Hilda Ponichtera. Contrary to defendant's assertion, the prosecution did not misstate that Ponichtera had testified that she had observed Tubbs' leaving his apartment

with defendant on the day he disappeared. Rather, the argument cited by defendant pertains to the testimony of Tubbs' uncle, Victor Little, regarding a telephone conversation with defendant shortly after Tubbs disappeared, in which Little stated that he informed defendant that Ponichtera had seen Tubbs leave with him that day. Regarding Ponichtera's testimony, the prosecutor correctly argued that Ponichtera had indicated only having seen defendant's vehicle in the driveway of the home in which Tubbs' lived on the day he disappeared. The prosecutor's argument concerning the testimony of both parties was accurate and therefore provides no basis for relief.

There is similarly no merit to defendant's assertion that the prosecutor improperly injected defendant's economic status by noting during closing argument that defendant was retired, then immediately turning his argument to a discussion of defendant's conversation's with Derrick Taylor regarding the sale of illegal drugs. This Court has held long held that "[e]vidence of poverty and unemployment to show motive is generally not admissible because its probative value is outweighed by unfair prejudice and discrimination toward a large segment of the population, and the risk is that the jurors will view defendant as a 'bad man.'" *People v Stanton*, 97 Mich App 453, 460; 296 NW2d 70 (1980). However, the prosecutor's argument did not seek to persuade the jury that defendant was prompted by his unemployment or economic status to commit the charged crime. Rather, when viewed in context and in light of the evidence presented at trial, see *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002), the prosecutor's argument served only to support its theory that Tubbs' killing was motivated by his involvement with defendant in the drug trade. As previously discussed, this theory was properly supported by admissible evidence and highly relevant to the question of motive. Thus, we find no plain error in the prosecutor's argument.

Defendant also argues that the prosecutor improperly commented on his right to remain silent by referencing defendant's failure to make his presence known and speak with Detective Pfau and a second officer while the two were speaking with Larissa White at her kitchen table. We again find no error, plain or otherwise, in the prosecutor's comments. Although a prosecutor may not comment on a defendant's silence in the face of accusation, *People v Goodin*, 257 Mich App 425, 432, 668 NW2d 392 (2003), a defendant's constitutional right to remain silent is not violated by a prosecutor's comment on his silence before custodial interrogation and before *Miranda*⁶ warnings have been given, *People v Schollaert*, 194 Mich App 158, 160-161, 164; 486 NW2d 312 (1992). Because the prosecutor's statements referred to prearrest, pre-*Miranda* warning conduct, the statements did not constitute prosecutorial misconduct.

Defendant also urges that the prosecutor improperly shifted the burden of proof and further commented on defendant's silence in arguing before the jury that "[t]here is no claim of self-defense. There is no claim of accident. There's no claim that justifies, mitigates this to anything but murder." Again, we disagree. As defendant argues, a prosecutor may not undermine the presumption of innocence by suggesting that the defendant has an obligation to prove anything, because such an argument tends to shift the burden of proof. See *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995); see also *People v Green*, 131 Mich App 232,

⁶ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

237; 345 NW2d 676 (1983). However, a prosecutor may argue that particular evidence is uncontroverted or undisputed. *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998). The prosecutor's remarks were a proper comment on the evidence and did not suggest to the jury that defendant was required to prove anything. See, e.g., *People v Sanders*, 163 Mich App 606, 610-611; 415 NW2d 218 (1987). Moreover, even if the challenged remarks could be viewed as improper, the trial court's instructions that defendant did not have to offer any evidence or prove his innocence, and that the prosecution was required to prove the elements of the crimes beyond a reasonable doubt, were sufficient to cure any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001); see also *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) ("[j]urors are presumed to follow their instructions, and instructions are presumed to cure most errors").

Defendant additionally challenges a portion of the prosecutor's remarks as improper civic duty argument. A prosecutor may not urge jurors to convict a defendant as part of their civic duty. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *Abraham*, *supra* at 273. Such arguments are condemned because they inject issues into the trial that are broader than the defendant's guilt or innocence and encourage the jurors to suspend their own powers of judgment. *Abraham*, *supra*. Here, however, the prosecutor did not inject an issue broader than the guilt or innocence of defendant into his closing, and he did not encourage the jurors to suspend their powers of judgment. Rather, the prosecutor merely reminded the jurors that they had taken an oath to listen to the evidence and decide this matter based "on that and that alone." Although in doing so the prosecutor additionally indicated that, unlike the general public, the jurors did not have the "luxury" of putting this matter out of their minds, such comment was not inconsistent with the responsibility of a jury in a criminal matter and, therefore, did not constitute improper civic duty argument. *Bahoda*, *supra*. In any event, any prejudice arising from the prosecutor's argument in this regard was cured when the trial court instructed the jury that it should base its verdict only on the properly admitted evidence. *Abraham*, *supra* at 279. Defendant has, therefore, failed to show plain error requiring relief.

Finally, defendant argues that the cumulative error of the prosecutor's alleged misconduct constitutes reversible error. Although "[t]he cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not," reversal is warranted on such ground "only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial." *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). As explained above, if there was any error, it was corrected by the trial court's instructions to the jury. *Abraham*, *supra*. Accordingly, we find that none of the alleged errors seriously prejudiced defendant, and he was not denied a fair trial as a result of prosecutorial misconduct.

VI. Ineffective Assistance of Counsel

Defendant has similarly failed to show that he was deprived of the effective assistance of counsel at trial. Defendant argues that his defense counsel was constitutionally ineffective for having failed to object to instruction of the jury on the theory of aiding and abetting, the admission of evidence concerning the .38 caliber revolver found at White's home, and the numerous instances of prosecutorial misconduct cited by defendant. Defendant also cites as deficient his counsel's failure to object to the leading nature of the prosecutor's questioning of Derrick Taylor and Eugenia Hardy and the scoring of the sentencing guidelines. Defendant

additionally asserts that counsel failed to perform as constitutionally guaranteed by failing to move for a directed verdict at the close of the prosecution's proofs.

Because an evidentiary hearing on defendant's claims of ineffective assistance has not been held, this Court's review is limited to mistakes apparent on the record. See *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Whether the facts in the record suggest that defendant was deprived of his right to the effective assistance of counsel presents a question of constitutional law that this Court reviews de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To overcome this presumption, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and so prejudiced the defendant that he was deprived of a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); see also *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

As already discussed, the evidence supported instruction of the jury on the theory of aiding and abetting, and the prosecutor's conduct during closing was either wholly proper or did not otherwise prejudice defendant. As also already discussed, evidence and argument regarding the .38 caliber revolver was relevant to the question of defendant's guilt of the charged crime and thus properly admitted at trial. Thus, defendant has failed to show the deficient performance and prejudice necessary to establish that his counsel's failure to object to these matters denied him the effective assistance of counsel. *Leblanc, supra*; see also *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003) (defense counsel need not "make a meritless motion or a futile objection").

Although defendant also asserts as deficient the failure of his counsel to object to the leading nature of the prosecutor's questioning of Taylor and Hardy and the scoring of the sentencing guidelines, he fails to assert any prejudice arising from these failures. Thus, even were we to conclude that counsel's performance was deficient in this regard, defendant has failed to demonstrate the prejudice necessary to support his claim of ineffective assistance. *Pickens, supra*.

Further, any motion for a directed verdict would have been futile. *Goodin, supra*. In such a motion, the evidence adduced at trial is viewed in the light most favorable to the prosecution to determine whether evidence sufficient to support a rational juror in finding guilt beyond a reasonable doubt was lacking. *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998). As already discussed, the evidence presented by the prosecution was sufficient to support defendant's conviction.

VII. Right to Counsel

Defendant next argues that he was denied his right to counsel at both trial and sentencing. We disagree.

A. Trial

Following jury selection the prosecutor informed the trial court that defendant had raised an issue regarding whether or not attorney James Piazza would be present during the trial proceedings. Defendant then explained that although he had initially retained only attorney James Gust, he later felt it prudent to retain a second attorney “to ensure that [he] had the proper representation,” and thus also retained Piazza. Defendant asserted that when he retained Piazza it was his understanding that Piazza, who was currently in trial on another matter, would be part of his “defense team” at trial, and objected to proceeding without both Gust and Piazza present. After noting that Gust was a “very qualified and experienced” attorney, and that it was his understanding that Piazza “was in for purposes of motions only,” the trial court indicated that it intended to proceed with the trial the following morning. The court further indicated, however, that it would consider any authorities presented by the parties concerning whether both Gust and Piazza were required to be present at trial.

Piazza appeared before the trial court the following morning and, after explaining that he was currently in trial on another case, indicated that he had been retained only to assist Gust. Piazza explained that he and Gust had “divied up” the work to be done in this matter, with Piazza taking on motions and legal issues and Gust handling the factual issues. Gust then indicated that there was a misunderstanding with defendant as to representation, but that defendant clearly thought both would be at trial and did not wish to proceed without both attorneys present. After noting that trial had been scheduled for nearly five months and that this was the first it had heard that defendant wanted both lawyers present, the trial court stated that it would proceed with the trial, with Piazza welcome to join the proceedings after completing his other trial. For reasons not apparent from the record, Piazza did not, however, participate further in the trial proceedings.

On appeal, defendant asserts that Piazza’s absence at trial denied him his Sixth Amendment right to counsel. This Court reviews de novo whether defendant was denied his constitutional right to counsel. See *In re Wentworth*, 251 Mich App 560, 561; 651 NW2d 773 (2002) (constitutional issues are reviewed de novo).

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” US Const, Amend VI. One element of this basic guarantee is the right to counsel of choice. *Powell v Alabama*, 287 US 45, 53; 53 S Ct 55; 77 L Ed 158 (1932). The right to counsel of choice, however, is not absolute. *Wheat v United States*, 486 US 153; 108 S Ct 1692; 100 L Ed 2d 140 (1988). Thus, where considerations of judicial administration supervene, the presumption in favor of counsel of choice is rebutted and the right must give way. See *United States v Gonzalez-Lopez*, ___ US ___, ___, 126 S Ct 2557; 165 L Ed 2d 409 (2006) (recognizing “a trial court’s wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar”); see also *Wilson v Mintzes*, 761 F2d 275, 280-281 (CA 6, 1985) (explaining that the right to choose one’s own counsel is tempered by considerations of “prompt and efficient administration of justice”).

Here, defendant, in essence, sought a continuance until such time as Piazza was available to join his lead counsel at trial.⁷ The determination whether to allow a defendant a continuance to secure counsel of his own choosing is a matter within the traditional discretion of the trial court; and in making that determination, the court should apply a test of reasonableness. *Ungar v Sarafite*, 376 US 575, 589; 84 S Ct 841; 11 L Ed 2d 921 (1964); see also *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002). As the Supreme Court stated in *Ungar, supra*, the answer to the question whether the denial of a continuance is an abuse of discretion so as to violate the federal constitution “must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.” In light of the reasons presented to the trial court, its decision to proceed with trial was within the principled range of outcomes and not, therefore, an abuse of its discretion. *Babcock, supra*; *Maldonado, supra*.

In reviewing a trial court’s decision to deny a continuance, this Court considers the following factors: (1) whether the defendant is asserting a constitutional right; (2) whether the defendant has a legitimate reason for asserting the right; (3) whether the defendant was negligent in asserting the right; and (4) whether the defendant is merely attempting to delay trial. *People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999); *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). Here, defendant is asserting a constitutional right. As noted, the right to counsel of one’s choosing is guaranteed by the Sixth Amendment of the United States Constitution. However, while it does not appear that defendant’s objection to proceeding without Piazza was merely an attempt to delay trial, that defendant wished merely “to ensure that [he] had the proper representation” by having both Gust and Piazza attend his trial is an insufficiently legitimate reason for asserting this right. Indeed, while the Sixth Amendment affords the right to counsel of one’s choosing, “the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.” *Wheat, supra* at 159. Here, despite Piazza’s inability to attend trial, Gust, who the trial court described as “very qualified and experience” attorney, stood ready to represent defendant at trial.⁸

⁷ Although it is unclear whether Piazza would have voluntarily joined the proceedings after concluding the other trial, defendant’s objection to proceeding without Piazza cannot be characterized otherwise.

⁸ Defendant’s reliance on *Gonzalez-Lopez, supra*, for the proposition that it is irrelevant whether defendant in fact received the effective assistance of competent counsel is misplaced. Although the Court in *Gonzalez-Lopez* held that “[w]here the right to be assisted by counsel of one’s choice is *wrongly* denied, . . . it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation,” the parties in *Gonzalez-Lopez* conceded on appeal that the trial court had erroneously deprived the defendant of his right to counsel of his choosing. *Id.* at _____. (Emphasis added). Thus, the sole legal issue before the Court was what level of prejudice, if any, must be shown once it was determined that an erroneous deprivation of one’s counsel has occurred. *Id.* at _____. Here, however, the issue is whether the trial court’s refusal to delay trial was an abuse of its discretion and thus an erroneous deprivation of counsel in violation of the Sixth Amendment.

Moreover, while defendant asserted that he understood that Piazza would be present at his trial, both Gust and Piazza, as well as the trial court, seemed to clearly understand Piazza's limited role in defending defendant in this matter. Thus, defendant's failure to assert his alleged right to Piazza's presence at trial was also negligent. *Echavarria, supra*. Under these circumstances, and considering that trial in this matter had been scheduled for nearly five months, the trial court did not abuse its discretion in refusing to delay trial. Defendant was not, therefore, denied his federal constitutional right to counsel.

B. Sentencing

Defendant also argues that he was denied his right to counsel at sentencing. We again disagree.

Approximately one week before sentencing in this matter, Gust moved to withdraw from his representation of defendant on the ground "[t]hat there has been a breakdown in the attorney client relationship." At a hearing on this motion held just three days before sentencing, defendant indicated that he was in "full agreement" with Gust's claim of a breakdown in the attorney-client relationship. Defendant further indicated that he was "working" on retaining new counsel. The prosecution, however, opposed the motion, stating that it "believe[d] it would cause an unnecessary delay to have any new counsel in." The trial court denied the motion at that time, stating, "Well, I'll take it under advisement, and we'll see, counsel, if he's got other coun[sel] here, but I'm not going to excuse you right now."

Gust thereafter appeared on defendant's behalf at sentencing, where he challenged the presentence investigation report on a number of grounds and urged the trial court to consider when imposing sentence that the verdict in this matter was likely a compromise between the jurors, given that both he and the prosecutor concentrated their arguments at trial on the offense of first-, as opposed to second-, degree murder. On appeal defendant claims that his Sixth Amendment right to counsel was violated because he was required to proceed with unwanted counsel, who presumptively could not have been a diligent advocate given his desire to withdraw from this matter. The material question is, again, whether the trial court abused its discretion in failing to delay the proceedings, and permit defendant to obtain substitute counsel. As already discussed, the right to counsel of one's choice is not absolute and is thus subject to being balanced against the effective administration of justice. *Wheat, supra*; *Gonzalez-Lopez, supra*. With this in mind, we again find no abuse of discretion in the trial court's decision.

The record indicates that although defendant offered a legitimate reason for delaying the proceedings and obtaining new counsel, i.e., a breakdown of the attorney-client relationship, he failed to provide any factual support for this claim. Further, the trial court ascertained that the relationship between defendant and his counsel, who was present and prepared for sentencing, was sufficient for adequate representation and that to delay the proceedings was merely to "delay the inevitable." It cannot be said that the trial court erred in declining to sacrifice judicial economy to unsubstantiated claims of a breakdown in the attorney-client relationship and the potential involvement of a new attorney. Accordingly, we do not conclude that defendant was denied his constitutional right to counsel at sentencing.

VIII. Sentencing

A. Constitutionality

Citing *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), defendant contends that the trial court unconstitutionally “increased the statutory sentencing guidelines range based on facts that were neither found beyond a reasonable doubt by the jury nor admitted by defendant.” However, in *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006) our Supreme Court definitively held that “‘the Michigan [indeterminate sentencing] system is unaffected by the holding in *Blakely*’”, quoting *People v Claypool*, 470 Mich 715, 730 n. 14; 684 NW2d 278 (2004). We are bound by the Court’s decision in *Drohan*, and thus find no merit in this constitutional challenge to defendant’s sentence.

B. Resolution of PSIR Challenges

Finally, defendant argues that he is entitled to resentencing because the trial court failed to resolve his factual challenges to information contained in the presentence information report (PSIR) before imposing sentence. We agree.

At sentencing, counsel for defendant objected to the PSIR’s indication that defendant had threatened a former business associate, Gary Pieknick, by threatening to break his fingers and then chop off his head in order to teach him a lesson. Counsel indicated that defendant denied having ever made such a threat and also asserted that the report’s description of the killing as a “brutal, gruesome torture, murder, and dismemberment” was unsupported by the evidence. In particular, counsel noted that the evidence at trial indicated that the burn on Tubbs’ right hand could have been inflicted as much as three days before his death. Counsel also cited as unsupported by the evidence the PSIR’s indication that a witness had seen Tubbs leave his apartment with defendant on the day he disappeared.

Regarding such challenges, MCR 6.425(E)(2) provides:

Resolution of Challenges. If any information in the presentence report is challenged, the court *must allow the parties to be heard regarding the challenge, and make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing.* If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to

(a) correct or delete the challenged information in the report, whichever is appropriate, and

(b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections. [Emphasis added.]

As indicated by the language emphasized above, MCR 6.425(E)(2) plainly requires that a trial court respond to challenges regarding the accuracy of information in a PSIR by making a finding regarding the challenge or determining that a finding is unnecessary because the court

will not take the challenged information into account in determining the defendant's sentence. See *People v Spanke*, 254 Mich App 642, 648-649; 658 NW2d 504 (2003). Here, however, the trial court responded to defendant's various challenges, if at all, merely by indicating that defendant's objections to the PSIR had been "noted." This Court has held that where the trial court fails to resolve a claimed inaccuracy as required by the court rules, the case must be remanded to the trial court for it to clarify whether the disputed matter played a role in its sentencing decision. See *People v Landis*, 197 Mich App 217, 219; 494 NW2d 865 (1992). In such cases, if the trial court determines that it relied on the challenged information in imposing sentence, the defendant must be resentenced following the court's resolution of the challenge. *Id.* However, if it is determined that a disputed matter played no part in the sentencing decision, the defendant's sentence must be affirmed, and the trial court need only strike the disputed matter from the PSIR. *Id.*; see also *People v Grove*, 455 Mich 439, 452, 477; 566 NW2d 547 (1997). Here, the trial court expressly stated before imposing sentencing that it had "taken into account the comments where [defendant] threatened to chop off the head of Mr. Pieknick . . . and break his fingers to teach him a lesson." The record thus makes clear that the trial court relied on that information despite having failed to resolve defendant's challenge in accordance with MCR 6.425(E)(2). Remand for resentencing is, therefore, required. *Landis, supra*.

Consequently, we vacate defendant's sentence and remand this matter for resentencing.⁹ On remand, an updated PSIR must be prepared and provided to the parties before resentencing. See *People v Triplett*, 407 Mich 510, 515; 287 NW2d 165 (1980); see also MCR 6.425(B). At resentencing, each party must have a chance to challenge the accuracy and relevance of information in the updated PSIR. MCR 6.425(E)(1)(b). The trial court must then rule on any challenge and take the appropriate action with respect to redacting or correcting the PSIR if necessary. MCR 6.425(E)(2). If the trial court chooses to disregard any information in the PSIR in sentencing defendant, that information must be stricken from the PSIR. *Landis, supra*. If the trial court orders the probation officer to alter the PSIR in any way, it must "provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections." MCR 6.425(E)(2)(b).

Affirmed, but remanded for resentencing. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ Kurtis T. Wilder

⁹ Because this matter must be remanded for resentencing, we need not address defendant's challenge to the trial court's departure from the sentencing guidelines range.